



UNIVERSITY  
OF  
JOHANNESBURG

<b><u>FACULTY</u></b>	: Law
<b><u>DEPARTMENT</u></b>	: Procedural Law
<b><u>CAMPUS</u></b>	: APK
<b><u>MODULE</u></b>	: ALS41Y0 / TPR0000 APPLIED LEGAL STUDIES
<b><u>SEMESTER</u></b>	: Second
<b><u>EXAM</u></b>	: November 2019 <b>MEMORANDUM</b>

<b><u>DATE</u></b>	: 12 November 2019	<b><u>SESSION</u></b>	: 08:30-11:30
<b><u>ASSESSOR(S)</u></b>	: MR EJ HANEKOM		
<b><u>MODERATOR</u></b>	: PROF R CLOETE		
<b><u>DURATION</u></b>	: 3 HOURS	<b><u>MARKS</u></b>	: 100

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NUMBER OF PAGES: 4 PAGES

INSTRUCTIONS:

1. Answer all the questions.
2. Do not make up any facts unless granted permission to do so in the question.
3. Use full sentences.
4. A pocket calculator may be used.

**QUESTION 1**

You are acting on behalf of the husband in a divorce case. The parties have been married for 15 years. You have issued and served summons on the wife.

The parties have two children born from the marriage. One is a minor and the other is 18 years old, but in school doing matric. The husband and wife cannot agree on where the children would mainly reside after the divorce case. The wife maintains that the husband is an abusive person and that he is aggressive towards the children. Your client instructs you that the wife is an alcoholic and that she does not look after the children properly and neglects them.

May the court simply grant the divorce?

Evaluate these facts and then explain with reference to the Mediation in Certain Divorce Matters Act, 82 of 1987, what procedures can be followed by the court and what can be done in order to assist the court to understand who should be granted parental responsibilities and rights, where the children should mainly reside after the divorce and who should have contact with the children.

Who / what entity or person may the court turn to for assistance? May this entity or person intervene in the court proceedings on its own accord? If so, explain what may be done to safeguard the children's rights. [15]

**ANSWER 1****[15]**

No. [1] Divorce Act sec 6(1) A decree of divorce shall not be granted until the court-

(a) is satisfied that the provisions made or contemplated with regard to the welfare of any minor [1] or dependent child [1] of the marriage are satisfactory or are the best that can be effected in the circumstances; [1] and

(b) if an enquiry is instituted by the Family Advocate [1] in terms of section 4 (1) (a) or (2) (a) of the Mediation in Certain Divorce Matters Act, 1987, has considered the report and recommendations [1] referred to in the said section 4 (1).

(2) For the purposes of subsection (1) the court may cause any investigation which it may deem necessary, [1] to be carried out and may order any person to appear before it [1] and may order the parties or any one of them to pay the costs of the investigation and appearance. [1]

6(4) For the purposes of this section the court may appoint a legal practitioner to represent a child [1] at the proceedings and may order the parties or any one of them to pay the costs of the representation.

**The Family Advocate [1] can assist and may:**

SEC.4(1)(a) & (b)

- After institution of a divorce action or application lodged for variation, rescission or suspension of order already made regarding custody or guardianship of minor / dependent child, and
- if requested by a party or the court, [1]
- institute an enquiry to furnish report and recommendations to the court. [1]

#### SEC.4(2)(a) & (b)

- If he deems it in the interest of a minor / dependent child, apply to court to be authorized to institute an enquiry to furnish report and recommendations to the court. [1]

#### SEC.4(3)

if he deems it in the interests of a child or if requested by court:

Appear at divorce trial or at application hearing and may adduce evidence relevant and cross-examine witnesses. [1]

### **QUESTION 2**

[5]

Section 9(1) of the Divorce Act, 70 of 1979, reads as follows:

“9 Forfeiture of patrimonial benefits of marriage

(1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.”

Critically evaluate the requirement of “substantial misconduct” with reference to case law.

### **ANSWER 2**

[5]

**MC v JC 2015 JDR 1734 (GP) =[Cilliers v Cilliers] [1]**

Partial forfeiture was ordered by Regional court. **On Appeal:** “[33] It would appear that the argument raised by counsel for the appellant that section 9(1) is wholly outdated, [1] within the constitutional context, [1] may have merit- particularly in that it punishes [1] a party for “substantial misconduct” by depriving him/her of patrimonial benefits of the marriage in the absence of proof of how such conduct may have impacted on the estate.” [1]

### **QUESTION 3**

You are an attorney. After taxation of a High Court Bill of Costs, where the initial totals before taxation were R 500 000,00 on fees and R 70 000,00 on disbursements, the Taxing Master taxed off R 20 000,00 off the fees and R 10 000,00 off the disbursements.

Complete the Allocator.

[10]

### **ANSWER 3**

[NOTE TO MARKER: If VAT is just one amount and it is correct, give the 3 marks.]

<b>[HIGH COURT]</b>	<b><u>TOTALS</u> FEES:</b>	<b>DISBURSEMENTS</b>
	<b>500 000.00</b>	<b>70 000.00</b>
LESS TAXED OFF [½]	20 000.00	10 000.00
<b>Subtotals</b>	<b>480 000.00 [½]</b>	<b>60 000.00 [½]</b>
DRAWING FEE (11% on fees) [½]	52 800.00 [½]	
Subtotal	532 800.00 [½]	
DISBURSEMENTS	60 000.00	
<b>Subtotal</b>	<b>592 800.00 [½]</b>	
Attendance Fee (11%- 1 <sup>st</sup> R10 000) [½]	1 100.00 [½]	
Attendance Fee (6%- 2 <sup>nd</sup> R10 000) [½]	600.00 [½]	
Attendance Fee (3%- Balance) (On R 572 800.00) [½]	17 184.00 [½]	
<b>SUBTOTAL</b>	<b>611 684.00</b>	
VAT ON FEES (R 480 000.00) 15% [½]	72 000.00 [½]	
VAT ON DRAWING FEE 15% [½] (R 52 800.00)	7 920.00 [½]	
VAT ON ATTENDANCE FEE 15% [½] (R 18 884.00)	2 832.60 [½]	
<b>TOTAL:</b>	<b>694 436.60 [½]</b>	

### **QUESTION 4**

Assume that the Legal Practice Act is in full operation and that you want to be admitted as a “legal practitioner”, either an attorney or an advocate, in 2020. Critically evaluate the 3 types of legal practitioner that is available for you in the legal profession. Mention the requirements for each and then criticize the positive and negative aspects of each of the possible options.

[15]

### **ANSWER 4**

[15]

[NOTE TO MARKER: This answer may be presented in a table format. I did

**not ask for the “admission” requirements. The students were prepared for this question but quite a number of them became confused during the exam. Please use an open discretion.]**

### **ADVOCATES- Without Fidelity Fund Certificate (FCC) [1]**

S24 - High Court admission application is required to be admitted to practice [1]

S30 - Application must be made to the Legal Practice Council to be enrolled [1]

S25- Appearance: any court [1]

S34(2)(a)(ii) & 34(2)(b) Instructions must be taken from attorneys & “Justice Centres” (LASA); these advocates do not have a trust accounts or FCC [1] which makes it easier for them to practice. [1]

But, this is also negative when compared to the advocate with an FCC who may take instructions directly from the public. [1]

S34(6) May practice:

For own account only / alone. [1]

No fee sharing with anybody or entity is allowed. [1]

Or at a:

Law Clinic

Legal Aid South Africa (LASA)

**for any of these [1]**

State Attorney/SAHRC

### **ADVOCATES (with FFC)**

The positive for these advocates are that in terms of S34(2)(a)(i) & 34(2)(b) they may take instructions directly from the public [1] & “Justice Centres”; but the negative is that they must have a trust account & FFC. [1]

The rest of the requirements are the same as for the Non-FFC advocate.

### **ATTORNEYS**

S24 - High Court admission application is required to be admitted to practice [1]

S30 - Application must be made to the Legal Practice Council to be enrolled [1]

S25- Appearance: any court but a Certificate is required for HC, SCA & CC [1] which is a negative extra requirement.

S34(1) Instructions may be taken directly from public; must have a trust account & FFC [1]

S34(5) May practice:

For own account or as a member of Legal entity [1] which is a positive as fee sharing with other attorneys is allowed. [1]

They may also, like advocates practice at a Law Clinic, LASA or the State Attorney/SAHRC.

[In table format it would look something like this]

<b>ATTORNEYS</b> <b>S24- High Court admission to practice</b> <b>S30-Application to Legal Practice Council (LPC) to be enrolled</b> <b>S25- Appearance: any court- But a Certificate is required for HC, Supreme Court of Appeal &amp; Constitutional Court</b> <b>S34(1) Instructions from public; must have a trust account &amp; FFC</b> <b>S34(5) May practice: For own account</b> <b>Member of Legal entity</b> <b><u>Or at a:</u></b> <b>Law Clinic</b> <b>Legal Aid South Africa (LASA)</b> <b>State Attorney/SAHRC</b>	<b>ADVOCATES (with Fidelity Fund Certificate (FFC))</b> <b>S24- HC admission to practice</b> <b>S30-Application to LPC to be enrolled</b> <b>S25- Appearance: any court</b> <b>S34(2)(a)(i) &amp; 34(2)(b) Instructions from public &amp; “Justice Centres”; must have a trust account &amp; FFC</b> <b>S34(6) May practice: For own account only</b> <b>No fee sharing allowed</b> <b><u>Or at a:</u></b> <b>Law Clinic</b> <b>LASA</b> <b>State Attorney/SAHRC</b>	<b>ADVOCATES- (Without FFC)</b> <b>S24- HC admission to practice</b> <b>S30-Application to LPC to be enrolled</b> <b>S25- Appearance: any court</b> <b>S34(2)(a)(ii) &amp; 34(2)(b) Instructions from attorneys &amp; “Justice Centres” (LASA); no trust account or FFC</b> <b>S34(6) May practice: For own account only</b> <b>No fee sharing allowed</b> <b><u>Or at a:</u></b> <b>Law Clinic</b> <b>LASA</b> <b>State Attorney/SAHRC</b>
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## **QUESTION 5**

You are an attorney. One of your colleagues, also an attorney, appoints you to represent him in a disciplinary hearing before a Disciplinary Committee of the Gauteng Legal Practice Council. (LPC) He states that the LPC wanted to come and inspect his accounting records last week, but he was afraid, as he had “borrowed” some money from the trust account, so he refused them access to his books.

Furthermore, he had made transfers from his trust account by cellphone because cheque book fees are just too high and therefore he thinks he doesn’t need to know what the rules applicable to attorneys with regard to trust cheque books are. His computer is also broken for some time now.

He also took some fees in advance from the trust account because he knew that he would finalise the clients’ cases very soon. When you asked to see his current

books and trust balances, he informed you that he only does his books every 6 months.

Sometimes when he received deposits from clients, he deposited it directly into his business account before he did the work. His opinion is that the client would anyway have to pay him in future for the work done so the money belongs to him when it is handed to him.

Evaluate his legal position in terms of the Legal Practice Act and Rules for Legal Practitioners and advise him on how he should have handled his trust account in terms of what the act and the rules allow, and also what is prohibited. [15]

### **ANSWER 5**

[15]

**[NOTE TO MARKER: The student need to indicate what the legal practitioner's transgressions were and what the correct way of dealing with each issue is. They do not need to cite the Section or Rule numbers]**

- **New Rules – Rule 54.**
- Update books every month. The attorney didn't. [1] Rule 54.11
- List of trust balances: [1] must be drawn every month. [1] Rule 54.15.1

#### **Payments from trust banking account**

54.14.15.1 Any cheque drawn on a firm's trust banking account shall be made payable to or to the order of a payee specifically designated. [1]

54.14.15.2 Payments from the trust banking account of a firm shall only be by cheque [1] or electronic transfer. [1]

54.14.15.3 No withdrawals from the trust banking account of a firm may be made by way of cellular [1] and telephone transacting. [1] Annual audit on audit form: submitted by LS approved accountant to LS. [1]

- Records must be kept for 7 years. [1] Rule 54.9 actually states 7 years & Rule 54.15.3 refers back to it as 5 years.
- LPC may inspect attorney's books. The attorney refused that they may do that. [1]
- He may also never take fees in advance. In this case he did so. [1]
- Deposits must be deposited into trust account. [1] He deposited it directly into his business account [1]
- The attorney can't "borrow" some money from the trust account as belongs to the client and does not form part of legal practitioner's assets! [1]

- **Rule 54.11** Trust money shall in no circumstances be deposited in or credited to a business banking account. [1]
- It is ledgered in the client's name. [1]

He has transgressed most of these rules and will probably be found guilty by the LPC's committee. [1]

### **QUESTION 6**

You are an Attorney. You will act on behalf of Mrs. Danny da Gama. Read the Consultation Notes hereunder and then draft the complete Particulars of Claim to execute your client's instructions.

#### **CONSULTATION NOTES**

Danny da Gama gave you instructions to represent her. She wants to issue a divorce summons against her husband in the High Court in Johannesburg because she knows an advocate that will appear on her behalf.

#### **The person that did the consultation wrote down the following:**

Her husband is Vasco da Gama, identity number: 630520 3456 084, a professional wrestler, residing at 5 Kingsway, Auckland Park, Johannesburg. He earns a net income of R50 000,00 per month.

Her own details are: identity number: 630514 1234 08 1, she is a lecturer at the University of the Witwatersrand and she still lives with her husband.

Her nett income is R 20 000,00 per month. She has always contributed her fair part to the household expenses.

They got married to each other on 15 July 1999 in Parys, Free State. Danny said that they did not sign an ante-nuptial contract before the marriage. Vasco convinced her to marry him by promising that he will support her fully financially and that she can stop working. He never complied with this.

They have one child together namely James, a boy born on 16 September 2006. Danny is also the mother of Letitia, a 2<sup>nd</sup> year student born on 10 December 1998. Letitia's natural father is one Peter Gigolo, a rich millionaire. The children presently live with Danny at home.

Danny also stated that she does not belong to any Pension Fund, but Vasco belongs to the Government Employees Pension Fund. Danny said she is entitled to half of his pension fund.

James is in grade 8. Vasco loves James but always hated Letitia.

Danny also stated that she found herself a new man with the name Vito Casanova. She will be moving out of the house on 30 November 2019. She doesn't love Vasco anymore. They don't talk to each other anymore. She says Vasco had been a huge disappointment to her.



From 1999 they lived together in Vasco's house that is still registered in his name only. The house was paid off by him. They have divided their loose assets and Danny said Vasco can keep the house. Vasco will represent himself in the action.

She however wants R 10 000,00 per month as maintenance from Vasco. She also said that the two children must definitely stay with her after the divorce and for them she wants R 2000,00 per month each. You advise Danny properly about Letitia's rights to maintenance and Danny accepts your advice.

Danny consulted at your practice, IAM Goody and Partners Attorneys, at 8 Empire road, Auckland Park, Johannesburg. It is the very first case that you will handle. The detail of your practice is as follows: email: [iamgoody@attorney.com](mailto:iamgoody@attorney.com), P.O. Box 555 Auckland Park 2006 Tel +27 11 567 2121 Fax: (011) 567-2049

**Draft the Particulars of Claim that is required to execute your clients' instructions. Include the header and the footer. [40]**

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### **ANSWER 6**

**[NOTE TO MARKER: Students were not allowed to make up any facts. They had to use the facts given to them.]**

**IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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**CASE NUMBER:**

**In the matter between:**

**DA GAMA, DANNY**

**Plaintiff**

**and**

**[1]**

**DA GAMA, VASCO**

**Defendant**

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**PARTICULARS OF CLAIM [1]**

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**[1] 1.**

The Plaintiff is **DANNY DA GAMA**, identity number: 630514 1234 08 1, a major female lecturer at the University of the Witwatersrand, 5 Kingsway, Auckland Park, Johannesburg. **[1]**

2.

The Defendant is **VASCO DA GAMA**, identity number: 630520 3456 08 4 a major male professional wrestler, residing at 5 Kingsway, Auckland Park, Johannesburg. [1]

3.

The Plaintiff and the Defendant [1] are domiciled within the area of jurisdiction of this Honourable Court and have been so domiciled on the date on which the action was instituted. [1]

**[You could also have drafted: "The Plaintiff and the Defendant are both ordinarily resident within the area of jurisdiction of the above-mentioned Honourable Court and have been ordinarily resident in the Republic for a period of not less than one year immediately prior to the date on which the action was instituted."]**

4.

4.1 The parties were married to each other in community of property [1] on 15 July 1999 in Parys and the marriage still subsists. [1]

5.

5.1 The parties are the biological parents of one child, [1] namely:

5.1.1 James, a boy born on 16 September 2006; [1]

5.2 The minor child is presently in the care of Defendant and resides [1] with Defendant at the address stated in paragraph 2 hereof.

5.3 It is in the minor child's best interests that the parental responsibilities and rights in respect of the minor child are shared between the parties. [1]

5.4 It is in the minor child's best interest to mainly reside with the Plaintiff. [1]

5.5 It is in the minor child's best interests if the defendant has reasonable contact with him having regard to his religious, social-, school- and extra-mural activities. [1]

6.

The marriage relationship between the parties has reached such a state of disintegration that it has broken down irretrievably [1] and there is no reasonable prospect of the restoration of a normal marriage relationship [1] between them for the following reasons:

6.1 Plaintiff has lost all love for the Defendant; [1]

6.2 There is a lack of communication between Plaintiff and the Defendant. [1]

7.

The defendant is a member of a pension fund, namely the Government Employees Pension Fund. [1]

7.1 The pension fund as named in paragraph 8 is a pension fund as described in section 1(1) of the Divorce Act 70 of 1979. [1]

7.2 The pension interest / benefits of the defendant are regarded as part of the joint estate. **[1]**

7.3 The above-mentioned pension fund is not a retirement annuity. **[1]**

7.4 The defendant's pension benefits were not brought into consideration at a previous divorce. **[1]**

8.

There is no existing maintenance order against the Plaintiff or Defendant. **[1]**

9.

Plaintiff is entitled to maintenance from Defendant as:

9.1 it was a condition for entering into marriage that the Defendant has to support the Plaintiff fully financially; **[1]** and

9.2 Defendant neglected to comply with this condition. **[1]**

#### **WHEREFORE THE PLAINTIFF PRAYS FOR JUDGMENT AS FOLLOWS:**

(1) A decree of divorce; **[1]**

(2) Division of the joint estate; **[1]**

(3) The Government Employees Pension Fund or its successor in title is ordered to assign and pay/ transfer 50% of the pension interest to which the defendant is entitled to on the date of divorce as a member of the fund, to the plaintiff, **[1]** as a cash benefit, or to transfer 50% of the pension interest on her behalf to an approved pension fund / provident fund as if the defendant's membership of the fund is terminated on the date of the divorce on which date such benefit accrues to the defendant. **[1]**

(4) An order directing the Registrar of this Honourable Court to forthwith notify the Government Employees Pension Fund or its successor in title to make an endorsement in its records **[1]** that such part of the pension interest is so payable to the plaintiff and that the administrator of the pension fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification. **[1]**

(5) The Government Employees Pension Fund or its successor in title is ordered to endorse its records accordingly. **[1]**

(6) That parental responsibilities and rights in respect of the minor child be awarded to the Plaintiff subject to the provisions set out below: **[1]**

(a) the minor child will mainly reside with the Plaintiff: **[1]**

(b) the Defendant shall, having regard to the minor child's social, religious, school and extra-mural activities, have reasonable contact with the minor child. **[1]**

(7) Maintenance for the Defendant in the amount of R 10 000,00 per month; **[1]**

(8) Maintenance for the minor child in the amount of R 2 000,00 per month; **[1]**

- (9) Costs of the action. [1]  
(10) Further and/or alternative relief. [1]

**Dated at Johannesburg on this the 12th day of November 2019**

**[1 mark for the whole footer]**

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Ref: 1/2014

**TO:**

**THE REGISTRAR OF THE HIGH COURT  
GAUTENG LOCAL DIVISION  
JOHANNESBURG**

**AND TO:**

**VASCO DA GAMA**  
Defendant  
5 Kingsway,  
Auckland Park,  
Johannesburg.

**SERVICE BY SHERIFF**

**---END---**